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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN JOSE DIVISION
16

17 UNITED STATES OF AMERICA,
18
19 Plaintiff,
20 v.
21 HOLMES, et al.,
22 Defendants.

Case No. 5:18-cr-00258-EJD

**DEFENDANT RAMESH "SUNNY"
BALWANI'S REPLY IN SUPPORT OF
MOTION TO DISMISS SECOND AND
THIRD SUPERSEDING
INDICTMENTS BASED ON PRE-
INDICTMENT DELAY**

23 Date: October 6, 2020
24 Time: 10:00 a.m.
Judge: Honorable Edward J. Davila
25 Ctrm: 4, 5th Floor
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1 **I. INTRODUCTION**

2 Mr. Balwani's motion is about the government's inexcusable delay in bringing new
 3 charges in its Second Superseding Indictment ("SSI") and Third Superseding Indictment ("TSI").
 4 *See generally* Mot. (Dkt. 493). In response, the government claims that it "strains credulity to
 5 think that [the defendants] have not performed work to understand what happened" in Theranos's
 6 relationships with the newly identified alleged victims. Opp'n (Dkt. No. 514) at 16. Indeed, the
 7 government proclaims that Mr. Balwani has "had discovery relating to Walgreens, Safeway, and
 8 Theranos board members since the government's initial production and could not have failed to
 9 appreciate the government's intent to use such evidence." *Id.* Thus, according to the government,
 10 the new indictments' dramatic expansion of the length of the alleged conspiracy and the class of
 11 victims was knowable from the outset, and it is Mr. Balwani's fault for not combing through the
 12 discovery with an eye to determining what else the government could have charged. Putting aside
 13 this novel view of how criminal prosecution works, the government's admission that it had the
 14 information necessary to bring the new charges all along crystalizes precisely the problem that
 15 Mr. Balwani's motion identifies. Not one syllable of the government's brief contests that the
 16 government has had the facts needed to press these charges from the start. And nowhere does the
 17 government explain how any of the court's earlier rulings relates to the government's "re-
 18 evaluat[ion of] the charging language." *Id.*

19 Those glaring omissions confirm what Mr. Balwani showed in his motion and supporting
 20 papers: the government has had all the documents and facts about Walgreens, Safeway, the
 21 Theranos Board, and the duration of these relationships from the get-go. It made a tactical choice
 22 to withhold those charges. Tactics are allowed in litigation, but not to the point of creating pre-
 23 indictment delay in violation of a criminal defendant's Sixth Amendment rights. As the Ninth
 24 Circuit has held, the reason for the government's delay in bringing new charges "is the 'focal
 25 inquiry'" when deciding whether delay merits dismissal. *United States v. King*, 483 F.3d 969, 976
 26 (9th Cir. 2007) (citation omitted). And the government bears the burden of explaining that
 27 reasoning. *See McNeely v. Blanas*, 336 F.3d 822, 827 (9th Cir. 2003). It has not even tried.

28 Neither the complexity of this case, the volume of discovery, nor the challenges posed by

COVID-19 have anything to do with whether the government could have brought the charges in the SSI and the TSI in 2018, rather than spring them on Mr. Balwani in 2020 after he had expended vast efforts to meet the government’s already complex charges. More importantly, the government does not pretend otherwise.

Because of this delay between charging instruments—eighteen months even on the view most generous to the government—the absence of justification for the delay, and the presumptive resulting prejudice to Mr. Balwani, the SSI and TSI must be dismissed.

II. DISCUSSION

Dismissal is appropriate here after considering the four key factors that govern Sixth Amendment speedy trial analysis: (1) the length of the delay; (2) the reason for the delay; (3) the defendant’s assertion of his rights under the Speedy Trial Act; and (4) the prejudice to the defendant. *See United States v. Gregory*, 322 F.3d 1157, 1161 (9th Cir. 2003). Here, three of those factors favor dismissal, while one—whether Mr. Balwani has asserted his statutory speedy trial rights—is explained by the voluminous and still ongoing discovery and the complexity to which the government itself points in trying to explain its delays.¹

A. The delay between the original indictment and the Second Superseding Indictment supports dismissal.

The Ninth Circuit has held that delays between indictment and trial “approaching one year are presumptively prejudicial.” *Gregory*, 322 F.3d at 1162. Indeed, even a six-month delay may be a “borderline case,” depending on its complexity, though there is a “general consensus among the courts of appeals that eight months constitutes the threshold minimum.” *Id.* at 1162 n.3.

And as Mr. Balwani explained in his motion, this factor would weigh in his favor regardless of how the court measures the relevant time. *See Mot.* at 9–10. Despite the government’s extensive focus on the delays flowing from COVID-19, more than 20 months passed between the original indictment and the government’s May 2020 service of a draft

¹ Based on Judge Illston’s decision in *United States v. Cutting*, No. 14-CR-00139-SI-1, 2017 WL 66837 (N.D. Cal. Jan. 6, 2017), a similar analysis would also support dismissal under Federal Rule of Criminal Procedure 48(b).

1 superseding information on *Ms. Holmes*. Opp’n at 7. Even giving the government the benefit of
 2 every possible doubt and assuming that a grand jury would have returned the SSI before grand
 3 jury proceedings were suspended in March 2020, the delay is presumptively prejudicial. *See*
 4 *Gregory*, 322 F.3d at 1162; *Cutting*, 2017 WL 66837, at *7 n.10.

5 The government’s only counter to this timeline is to point out that this case is complex,
 6 and to cite a string of cases rejecting Sixth Amendment challenges to lengthy delays in other
 7 complex cases. *See* Opp’n at 11 (citing cases). Yet—as discussed below—this rote analysis
 8 misses the mark because the complexity here has nothing to do with the government’s deliberate
 9 decision to hold back expanded charges in violation of the Sixth Amendment.

10 **B. The lack of justification for the government’s delay supports dismissal.**

11 The government’s tactical delay means that the second factor weighs heavily in favor of
 12 dismissal. As Mr. Balwani has shown, the government has had information about Theranos’s
 13 relationships with Walgreens and Safeway, and with its Board, since 2016—two years before it
 14 brought the original indictment in this case. *See* Mot. at 3–5. And it had lab reports and other
 15 information for one patient in the TSI (M.E.) before the original indictment and for the another
 16 (B.B.) since October 2018, shortly after the First Superseding Indictment (“FSI”). *Id.* at 5. The
 17 government disputes none of this. The Court would examine the opposition in vain looking for
 18 any explanation for not earlier charging a conspiracy twice as long as the original Indictment or
 19 the FSI alleges, or for adding two massive corporations as alleged victims, along with two patient
 20 counts the government could have raised earlier but did not.

21 That information is simply not in the government’s papers. The government’s self-serving
 22 procedural history is long on dates and block quotations but short on discussion of which facts
 23 informing the SSI or TSI were unknown to the government long before those charging documents
 24 were filed. *See* Opp’n at 2–9. Instead of responding to the “focal inquiry” in speedy trial analysis,
 25 *see King*, 483 F.3d at 976, the government ducks it. It first notes the Supreme Court’s observation
 26 that delay may be “wholly justifiable. The government may need time to collect witnesses against
 27 the accused, oppose his pretrial motions, or, if he goes into hiding, track him down.” Opp’n at 10
 28 (quoting *Doggett v. United States*, 505 U.S. 647, 651 (1992)). Next, it asserts that the delays in

1 this case are “attributable to (1) the complexity of the case and the voluminous discovery, (2)
 2 extensive pretrial motion practice, and (3) COVID-19.” *Id.* at 12. But the government is zero for
 3 three on these points.

4 The government had everything it needed to bring the charges in the SSI and TSI literally
 5 years before it ultimately filed them in July 2020. So this time was not used to “collect witnesses”
 6 or “oppose pretrial motions” with no bearing on the expanded charges. And Mr. Balwani
 7 certainly did not flee. Nothing in the voluminous discovery explains the delay in these charges,
 8 whose underlying facts were known to the government long ago. And COVID-19 did not present
 9 a challenge here until March 2020. When the record does not show reason for the delay and the
 10 government has offered no reasonable explanation, courts assume that no justifiable reason exists,
 11 and “***weigh this factor heavily against the state.***” *McNeely*, 336 F.3d at 827 (emphasis added).
 12 That is the right course here.

13 The government spends space in its brief blaming Mr. Balwani for its own failure to
 14 produce documents under its control without motions practice, and for the temerity of Mr.
 15 Balwani’s objecting to charging theories that the Court has ruled legally deficient. *See* Opp’n at 3
 16 (noting the defendants’ successful motion to compel) and 13 (arguing that Mr. Balwani could
 17 have moved to dismiss the prior FSI earlier, and claiming that he should not be surprised that the
 18 government “evaluated the charging document through the lens of the ruling on the motions to
 19 dismiss and the defense motion practice”). Yet the government declines to raise even a single
 20 argument about what connection exists between the charging theories that the Court rejected and
 21 the new charges in the SSI and the TSI. There is none.

22 As with *Cutting*, the government “acted deliberately and intentionally with regard to
 23 charging the new crimes added in the superseding indictment.” 2017 WL 66837, at *10. As with
 24 *Cutting*, “the government simply chose to seek indictment on some of the charges of which it was
 25 aware, while holding back on others.” *Id.* As with *Cutting*, the superseding charges should be
 26 dismissed. The issue here is pre-indictment delay, not the time needed for Mr. Balwani to proceed
 27 to trial. And on that analysis, there is no basis for the Court to reward tactics designed to hold
 28 back charges in case certain theories were dismissed, only to spring them on a defendant if those

1 defeats came to pass. Whether under the Sixth Amendment or under Rule 48(b)—as the *Cutting*
 2 court ultimately ruled on reconsideration—these tactics should be stopped in their tracks.

3 **C. The volume of and deficiencies in the government’s discovery productions**
 4 **explain why Mr. Balwani has agreed to exclude time under the Speedy Trial**
 5 **Act.**

6 Mr. Balwani has never claimed to have asserted his rights under the Speedy Trial Act, or
 7 that this factor weighed in his favor. Instead, he has contended that agreeing “to certain
 8 continuances in order to have adequate time to attempt to review the voluminous discovery” does
 9 not preclude him from asserting his Sixth Amendment rights. *Cutting*, 2017 WL 66837, at *10.
 10 He is right.

11 The government does not contest that the volume of discovery in this case has been
 12 extraordinary. In fact, it trumpets it in trying to justify its own delays. But while extensive and
 13 deficient discovery productions do not justify the government’s decision not to bring the charges
 14 in the SSI and TSI that it knew about for two years or more, it does explain Mr. Balwani’s
 15 agreement to various exclusions of time when he had no realistic alternative.²

16 **D. Mr. Balwani has shown that he will likely suffer prejudice if the new**
 17 **indictments are not dismissed.**

18 The government also understates the ways in which Mr. Balwani’s defense has been
 19 impaired by this avoidable delay. Mr. Balwani—like any defendant—would have allocated
 20 resources and approached the complex trial preparation for this case differently had the
 21 government’s true intentions been clear from the start. At this late date—almost three years into
 22 preparing for a months-long trial—Mr. Balwani must now pivot to focus on the centrality of the
 23 newly alleged victims to the alleged conduct. The government blithely observes that Mr. Balwani
 24 has “performed work to understand what happened in those relationships.” Opp’n at 16. But its
 25 emphasis is misplaced; the issue is not whether Mr. Balwani has had *access* to information about
 26 these new alleged victims, but that he learned of their alleged victimhood in a criminal case two

27 ² The government also seems to want credit for correcting one of the deficiencies in its discovery
 28 productions emblematic of the slipshod document production that Judge Illston found problematic
 in *Cutting*. See Opp’n at 5 n.2. Yet the government completed this supposedly above-and-beyond
 work on September 8, 2020, after Mr. Balwani filed this motion. See *id.*

1 years after the original indictment.

2 Discovery here has exceeded 20 million pages. This volume of discovery and the gravity
3 of the charges require deciding the key areas of concern, prioritizing indicted conduct, focusing
4 on alleged victims, and strategizing resource allocation. The government is wrong to conflate Mr.
5 Balwani's receiving discovery on Walgreens, Safeway, and Theranos Board members with his
6 being on notice that Walgreens, Safeway, and Theranos Board members are alleged victims of an
7 alleged criminal conspiracy. The government's emphasis on how obvious it should have been to
8 Mr. Balwani from its investigation that Walgreens, Safeway, and Theranos Board members might
9 someday become alleged victims in a future iteration of an indictment merely highlights the lack
10 of justification for failing to bring these charges years earlier. If the government's intent to use the
11 evidence about these entities and individuals should "not be surprising" to Mr. Balwani, then it
12 should be no surprise to the government to have to account for its unjustifiable delay here. Opp'n
13 at 16.

14 Finally, Mr. Balwani cannot let pass the government's claim that "[t]he changes in the
15 Third Superseding Indictment are modest." *Id.* It strains credulity that the government continues
16 to maintain that expanding an alleged conspiracy by three years and adding two giant
17 corporations and sophisticated Board members as victims does "not radically change the case."
18 *Id.* at 17. Similarly, the government contends that the superseding indictments "do not involve
19 substantial new discovery"—more evidence that no intervening discovery or revelation justifies
20 the government's delay in bringing these charges. *Id.* at 16. The government has not denied and
21 cannot deny that these charges could have been brought much sooner.

22 **III. CONCLUSION**

23 For these reasons, Mr. Balwani requests that the Court dismiss the Second and Third
24 Superseding Indictments.

1 Dated: October 2, 2020

Respectfully submitted,
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